

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05-46 OF
2004

B JAMES FOONG, RAUS SHARIF AND ABDULL HAMID EMBONG JJCA
20 JUNE 2007

C *Criminal Law — Dangerous drugs — Trafficking — Appeal by prosecution against acquittal of accuse — Acquittal after hearing defence — Innocent carrier — Whether accused had knowledge of nature of drug — Whether accused in possession of drugs — Dangerous Drug Act 1952 ss 12(2), 39A(2), 39B(1)(a)*

D The respondent was charged for an offence of trafficking in dangerous drugs, namely 74.93g of methamphetamine under s 39B(1)(a) of the Dangerous Drug Act 1952 ('DDA') in the Sandakan High Court. The case for the defence was that the accused was an innocent carrier of the methamphetamine. The respondent was acquitted after hearing his defence on the grounds that the prosecution had failed to prove that the

E accused had knowledge of the methamphetamine. The Deputy Public Prosecutor appealed on the grounds that the trial judge had erred in failing to consider that 'since the prosecution had shown that the respondent was in possession of the said drugs without resorting to s 37(d) of the DDA, the respondent must have knowledge of the nature of the drug'.

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Held allowing the appeal:

G (1) Though the learned trial judge did not make any positive ruling on the issue of possession by the respondent of the illicit drug found in his pocket, which was an essential ingredient to an offence faced by the respondent, he called for respondent's defence after the close of the prosecution's case. By adopting this course of action, it must be implied that the prosecution had proved to the satisfaction of the court that the respondent was not only in possession of the illicit drug but also knew of the nature of the said drug (see para 5).

H (2) It was unreasonable not to believe from the evidence that the respondent was unaware that the 'barang' he was to deliver to Suraida Tan was not illicit drug as determined by the chemist to be methamphetamine. The reasons were these: First, for this simple errand the respondent was paid handsomely which was against the normal cost paid for carrying out such simple task, unless it was for something unlawful. Second, this was not the first time the respondent performed such mission. It was his third when he was apprehended. Third, before the attempted delivery, respondent had kept the 'barang' under lock and key in his cupboard in his house. This implied that the 'barang' was something of value or illicit otherwise there was no necessity to be so cautious. Fourth, the respondent had every opportunity to open the packets to examine

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its contents. There was nothing to prevent him from investigating. He had ample opportunity to do so. This was a clear case of wilful blindness. Finally, above all, he knew the 'barang' to be white powder. This strongly suggested that he knew that it could not be anything else under those circumstances except illicit drug. He might not know the scientific name of the drug in his custody but certainly he knew it to be 'syabu', the street name for this sort of drug, as Suraida Tan had testified (see para 6).

- (3) The respondent might not be a trafficker of the illicit drug but the court was convinced that based on the reasons as stated, he was in possession of it and therefore guilty under s 12(2) of the DDA punishable under s 39A(2) of the same Act (see para 10).

[Bahasa Malaysia summary]

Responden telah dituduh kerana kesalahan mengedar dadah berbahaya, iaitu 74.93g seberat methamphetamine di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') di Mahkamah Tinggi Sandakan. Kes pihak pembelaan adalah bahawa tertuduh merupakan pembawa yang tidak tahu apa-apa tentang methamphetamine itu. Responden telah dibebaskan setelah pembelaannya didengar atas alasan bahawa pihak pendakwaan telah gagal untuk membuktikan yang tertuduh mempunyai pengetahuan tentang methamphetamine itu. Timbalan Pendakwa Raya telah merayu atas alasan bahasa hakim perbicaraan telah terkhilaf kerana gagal untuk mempertimbangkan bahawa 'since the prosecution had shown that the respondent was in possession of the said drugs without resorting to s 37(d) of the DDA, the respondent must have knowledge of the nature of the drug'.

Diputuskan, membenarkan rayuan tersebut:

- (1) Meskipun hakim perbicaraan yang bijaksana tidak membuat apa-apa perintah positif berhubung persoalan pemilikan oleh responden yang mana dadah berbahaya telah dijumpai dalam poketnya, yang merupakan bahan penting dalam kesalahan yang dihadapi oleh responden, beliau telah memanggil pembelaan responden setelah penutup kes pihak pendakwaan. Dengan menggunakan pendekatan tindakan ini, ia adalah tersirat bahawa pihak pendakwaan telah membuktikan dan meyakinkan mahkamah bahawa responden bukan hanya memiliki dadah berbahaya itu tetapi juga mengetahui tentang sifat dadah tersebut (lihat perenggan 5).
- (2) Adalah tidak munasabah untuk tidak mempercayai berdasarkan keterangan bahawa responden tidak sedar yang 'barang' beliau perlu serahkan kepada Suraida Tan bukan dadah berbahaya seperti yang ditentukan oleh ahli kimia sebagai methamphetamine. Alasan-alasannya adalah seperti berikut: Pertama, untuk serahan mudah ini responden telah dibayar lumayan dan tidak seperti kos biasa yang dibayar untuk mengendalikan urusan mudah sebegini; kecuali jika untuk sesuatu yang menyalahi undang-undang. Kedua, ini bukan pertama kali responden melakukan urusan sebegini. Ini adalah yang ketiga kali beliau ditangkap. Ketiga, sebelum serahan itu dibuat, responden telah menyimpan 'barang' itu terkunci dalam almari rumahnya. Ini tersirat bahawa

- A 'barang' itu suatu yang bernilai atau haram jika tidak tiada keperluan untuk berhati-hati. Keempat, responden mempunyai peluang untuk membuka bungkusan tersebut untuk memeriksa kandungannya. Tiada apa-apa untuk menghalangnya daripada menyiasat. Beliau mempunyai peluang untuk berbuat demikian. Ini adalah kes jelas tentang kealpaan yang disengajakan.
- B Akhirnya, walau apapun, beliau mengetahui yang 'barang' itu merupakan serbuk putih. Ini dengan nyata mencadangkan bahawa beliau mengetahui yang ia tidak mungkin apa-apa selain dadah berbahaya itu. Beliau mungkin tidak tahu nama saintifik dadah yang berada dalam milikannya tetapi beliau tahu ianya adalah 'syabu', nama yang digunakan untuk dadah jenis tersebut, sepertimana yang Suraida Tan telah beri keterangan (lihat perenggan 6).
- C (3) Responden tidak mungkin seorang pengedar dadah berbahaya itu tetapi mahkamah yakin bahawa berdasarkan alasan-alasan yang dinyatakan, beliau mempunyai milikan dadah itu dan oleh demikian adalah bersalah di bawah s 12(2) ADB yang boleh dihukum di bawah s 39A(2) Akta yang sama (lihat perenggan 10).]
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Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

E Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 170 (refd)

Legislation referred to

- F Dangerous Drugs Act 1952 ss 12(2), 37(d), 39A(2), 39B(1)(a)

Appeal from: Criminal Trial No S47–01 of 2003 (High Court, Sandakan)

- G *Mangaiarkarasi alp Krishnan (Deputy Public Prosecutor) for the appellant.*
Frederick KC Pang (Lau Ngan Siew & Co) for the respondent.

James Foong JCA (delivering judgment of the court):**H INTRODUCTION**

[1] The respondent was charged for an offence of trafficking in dangerous drugs under s 39B(1)(a) Dangerous Drugs Act 1952('DDA') in the Sandakan High Court and the said charge reads as follows:

- I That you, on the 31st day of May 2002 at about 10.15am at the five-foot way of Kedai Perabot Afgan, Pekan BDC, in the District of Sandakan, in the State of Sabah, did on your own behalf traffic in a dangerous drug to wit 74.93g of Methamphetamine and that you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and punishable under s 39B(2) of the same Act.

[2] At the end of the trial, the High Court acquitted the accused after hearing his defence. The reasons proffered by the High Court in acquitting him are:

In the premises the prosecution had failed to prove that the accused had knowledge of the methamphetamine and in the absence of such knowledge the accused cannot be said to be in possession of the methamphetamine and cannot, therefore, be guilty of trafficking, and neither has the prosecution in the circumstances aforesaid made out a case for possession against the accused. I, therefore, acquit and discharge the accused.

FACTS OF THE CASE

[3] The facts of this case are comprehensively set out by the trial judge as follows:

At about 7.15am on 31 May 2002 the Police arrested one Suraida Tan (PW5) for alleged possession of a dangerous drug. As a result of interrogation by the Police, Suraida Tan revealed that she had on the previous day planned to meet the accused later that morning for the accused to bring to her the 'barang'. A plan was quickly devised to trap the accused. Suraida Tan made a phone call to the accused to re-confirm their appointment for the accused to deliver the 'barang' to her. She arranged to meet the accused at 10.00 am at Kedai Perabot Afgan. A police party consisting of 10 policemen in plain clothes led by ASP Ahmad Kamaruddin Abdullah (PW3) went to the vicinity of Kedai Perabot Afgan, accompanied also by Suraida Tan to entice the accused to indicate to the police by means of a pre-arranged signal the identity of the accused upon his appearance for the appointment with Suraida Tan. While waiting for the accused to appear for the appointment Suraida Tan members of the police party were split and deployed at different places in the vicinity of Kedai Perabot Afgan while Suraida Tan was stationed in front of Kedai Perabot Afgan. When the accused eventually appeared and was approaching Suraida Tan, she gave the pre-arranged signal to Inspector Amanjit Singh (PW4) who together with Detective Lance Korporal Rosman bin Abu trailed from behind before both of them pounced on the accused and successfully overpowered him assisted by ASP Ahmad Kamaruddin Abdullah. Subsequently, ASP Ahmad Kamaruddin Abdullah searched the trousers pocket of the accused and retrieved from the front left pocket of his trousers a black plastic bag which was opened in front of the accused and members of the police party including Inspector Amanjit Singh. Inside the black plastic bag was a white envelope which contained two plastic packets each containing a crystalline substance. The crystalline substance was conclusively proved by the Government Chemist, one Ahmad Ridzuan Ibrahim (PW1) to be methamphetamine weighing 74.93g.

The case for the defence was that the accused was an innocent carrier of the methamphetamine. Under cross-examination ASP Ahmad Kamaruddin Abdullah admitted that the accused had told him that the methamphetamine belonged to one Hajjah Salhah and at about 7.45pm on the day the accused was arrested, he led ASP Ahmad Kamaruddin Abdullah to his place of abode where Hajjah Salhah was a lodger and recovered suspected dangerous drugs which ASP Ahmad Kamaruddin Abdullah seized. Hajjah Salhah was in the house at the time and she was also arrested. Suraida Tan also testified that the accused had told her that he was delivering the 'barang' for somebody and that it belonged to Hajjah Jalha who was also known as Hajjah Salhah.

Accused testified that the methamphetamine that was found in his trousers pocket on the day he was arrested was the 'barang' meant for delivery to Suraida Tan. He said he was doing it to earn extra income as he had also made a similar delivery to Suraida Tan about two weeks earlier and was paid RM100 by Hajjah Salhah. Although he admitted that he had seen the crystalline substance contained in plastic packets which he had kept for Hajjah Salhah under lock and key in his house he denied any knowledge of what the crystalline

- A substance actually was. He did not ask Hajjah Salhah what it was because he feared that asking too many questions would jeopardize his opportunity of earning an extra income. To him the RM100 he was paid by Hajjah Salhah for his earlier errand was a lot of money. He only earned about RM300 per month working at the Sandakan Port.

B THE PROSECUTION'S CONTENTION

[4] The main thrust of the prosecutor's appeal is that the trial judge had erred in failing to consider that 'since the prosecution had shown that the respondent was in possession of the said drugs without resorting to s 37(d) of the DDA, the respondent must have knowledge of the nature of the drug'.

C MY ASSESSMENT

- D [5] Though the learned trial judge did not make any positive ruling on the issue of possession by the respondent of the illicit drug found in his pocket, which is an essential ingredient to an offence faced by the respondent, he called for respondent's defence after the close of the prosecution's case. By adopting this course of action, it must be implied that the prosecution had proved to the satisfaction of the court that the respondent was not only in possession of the illicit drug but also knew of the nature of the said drug. Yet, when considering the merits of the respondent's defence, the trial judge said:

- E It is apparent that the case for the defence showed the accused to be not only naive but gullible. The accused did not ask for an explanation of the actual 'barang' he was asked by Hajjah Salhah to keep in his cupboard although he admitted to having seen the 'barang' to be white powder ('tepung putih') nor did he ask about it even when he was to deliver two packets of the barang to Suraida Tan on 31 May 2002 which led to his arrest. It is fallacious for the prosecution to equate knowledge that the 'barang' is valuable necessitating safe custody in a cupboard, to the accused having knowledge that the 'barang' was methamphetamine or that the 'barang' delivered by the accused to Suraida Tan on one previous occasion was methamphetamine. The latter part of each of the foregoing equations require more than mere assumption'.

- G [6] I am of the view that this finding is against the weight of evidence adduced. It is unreasonable not to believe from the evidence that the respondent was unaware that the 'barang' he was to deliver to Suraida Tan was not illicit drug as determined by the chemist to be methamphetamine. The reasons are these: First, for this simple errand the respondent was paid handsomely which was against the normal cost paid for carrying out such simple task, unless it was for something unlawful. Second, this was not the first time the respondent performed such mission. It was his third when he was apprehended. Third, before the attempted delivery, respondent had kept the 'barang' under lock and key in his cupboard in his house. This implies that the 'barang' was something of value or illicit otherwise there was no necessity to be so cautious. Fourth, the respondent had every opportunity to open the packets to examine its contents. There was nothing to prevent him from investigating. He had ample opportunity to do so. This is a clear case of wilful blindness. Finally, above all, he knew the 'barang' to be white powder. This strongly suggests that he knew that it could not be anything else under those circumstances except illicit drug. He may

not know the scientific name of the drug in his custody but certainly he knew it to be 'syabu', the street name for this sort of drug, as Suraida Tan had testified.

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[7] In the face of these, I find that the learned judge has erred in his conclusion that the respondent had no knowledge that the illicit drug found on him was methamphetamine.

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[8] Though the prosecution had proved that the respondent was in possession of the illicit drug but was he a trafficker? The respondent in his defence has said that he was only a carrier and the trial judge believed him. And there were creditable evidence to support this. One was the existence of Hajjah Salhah and the other was Suraida Tan's claim that the respondent had indeed told her that the 'barang' belonged to Hajjah Salhah. Further, the respondent was in fact on his way to make a delivery when he was apprehended. These, in my opinion would be sufficient to warrant acquitting the respondent of the charge of trafficking as he had raised a reasonable doubt in his defence which says otherwise — see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 170.

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[9] The learned deputy prosecutor before us has also stressed that the respondent, upon being confronted by the police before his arrest had attempted to escape. This indicates his guilt to the offence charged. The learned trial judge found otherwise and attributed the incident to an aggressive act by the police in apprehending the respondent. Based on the evidence adduced, I support this finding of the trial judge but wish to add that even if the respondent had attempted to run away, this could equally imply that he was in a state of panic and had foolishly reacted in this way when faced with the prospect of an arrest — see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1. This does not indicate his guilt to the offence charged.

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[10] The respondent may not be a trafficker of the illicit drug but I am convinced that based on the reasons as stated, he was in possession of it and therefore is guilty under s 12(2) of the DDA, punishable under s 39A(2) of the same Act. We found him guilty of this and after his plea of mitigation, we sentenced him to 15 years in prison from date of arrest and 10 stroke of rotan.

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POST SCRIPT

[11] My learned brother judges, Raus Sharif and Abdull Hamid Embong JJCA after reading the draft of this judgment had concurred with the views expressed therein.

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Appeal allowed.

Reported by Navit Kaur Randhawa

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